SUPREME COURT, U. S.
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No. 73-225

In the Supreme Court of the United States

OCTOBER TERM, 1973

SANDRA HALLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 477 F. 2d 453.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1973. A petition for rehearing was denied on May 31, 1973. The petition for a writ of certiorari was filed on August 2, 1973, and is thus substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether hearsay testimony may be admitted to establish predisposition to commit the crime when entrapment has been raised as a defense.

2. Whether the defendant is entitled to disclosure of the names of confidential informers whose hearsay statements are admitted on the issue of predisposition.

STATEMENT

Petitioner was convicted, following a jury trial in the United States District Court for the Southern District of Florida, on two counts of a seven-count indictment charging her and three co-defendants (tried separately) with possession and sale of heroin, in violation of 21 U.S.C. 841. She was sentenced to concurrent terms of three years' imprisonment followed by a special parole term of three years (Tr. 165). The court of appeals affirmed (Pet. App. A).

1. Federal narcotics agent Walde testified that on May 17, 1972, working as an undercover agent, he and an informant, Stone, went to petitioner's apartment in Oakland Park, Florida, to see a suspected drug dealer, Mike Ball, who lived there with petitioner (Tr. 10). At the apartment they encountered petitioner, who was leaving with several other people. Petitioner asked Stone and agent Walde to watch the apartment until she returned. When she returned from an errand with an unidentified male, Stone asked petitioner if they could "cop some stuff," *i.e.*, purchase some heroin (Tr. 11). She agreed and asked them to return in 15 minutes. When they returned, petitioner was standing outside the apartment. Agent Walde attempted to give her fifty dollars on the street, but petitioner said "That's not cool. Let's get in the car" (Tr. 12). Agent Walde,

Stone and petitioner then got into the agent's car. Petitioner told the agent that the 15 minute delay was required because she didn't want to deal while the other man, who had accompanied her back to the apartment, was present (Tr. 22). Petitioner was concerned about whether agent Walde was "cool," since she had never met him. She was satisfied, however, after seeing a driver's license, that he was not "the heat," *i.e.*, a policeman (Tr. 13). Petitioner handed agent Walde a foil package which she said contained five "dime bags," for which the agent paid her $50 (Tr. 12). The contents of the bags were subsequently found to be heroin (Tr. 15). Agent Walde testified further that no representations were made to petitioner as to the intended use of the heroin and that she exhibited no reluctance whatever to make the sale (Tr. 26-27). On May 23, 1972, petitioner went with the agent and Stone to see co-defendant Brooks for a second purchase (Tr. 64).

Petitioner admitted the sale of heroin, but claimed that she was entrapped. Testifying in her own behalf, petitioner claimed that when Walde and Stone appeared at her apartment, "they asked me if I could get them some [heroin], and I said no, I didn't want to in particular. * * * I was told that the agent's wife was an addict; that she needed it badly; that the man they usually got it from had been busted. * * * I said I didn't have any. I never keep any at the house" (Tr. 41).

Petitioner claimed that she had never sold heroin prior to this incident, although she had been an addict for "about two years." She stated that she had a narcotics habit requiring two bags of heroin a day, and she was under the influence of drugs when the two arrived (Tr. 47). Petitioner further testified that to her knowledge narcotics had never been sold at her apartment (Tr. 44),

Mike Ball was not dealing in heroin there (Tr. 45), and neither she nor Ball kept any quantity of drugs on the premises (Tr. 48). She acknowledged, however, that several people frequented her apartment to use drugs (Tr. 59) and that often the drug purchase and use constituted a group activity (Tr. 60). She testified that she got the narcotics from "John Love" some four or five blocks away (Tr. 54).

In rebuttal, the government presented hearsay testimony to show petitioner's predisposition to sell heroin. Officer Jack D'Ambrosia of the Oakland Park Police testified over petitioner's objections that petitioner had a reputation for dealing in drugs. Officer D'Ambrosia said (Tr. 78-79):

> I was approched [by several informants] and was told that heroin was being dealt from the apartment during the day and night, at all hours of the day and night; a lot of traffic in and out of the apartment, both black and white people.
>
> I watched the apartment for a while and saw heavy traffic, and I informed our uniformed division to also keep an eye on the apartment for me, and if anybody familiar or familiar to us involved in narcotics was seen leaving or entering the apartment, I wanted to know about it.
>
> * * * * *
>
> The Fort Lauderdale Police Department informed me that their informant had also stated that Haller and Ball were both dealing in heroin from the apartment. And from our own police department and records clerk who lived very close to the Hallers and Ball also advised me that the neighborhood was buzzing with rumors and people talking

> about the apartment, the large amount of traffic entering and leaving.

Officer D'Ambrosia testified that the informant, Stone, had related to him that petitioner was present when narcotics were sold there by Mike Ball, and "if Ball was not at home, Sandra Haller would sell the drugs" (Tr. 80-81). Informant Stone also related to the agent a specific sale by Haller to a known drug user, McFarland (Tr. 90). Petitioner was identified in police files as a heroin user (Tr. 106). On cross-examination by defense counsel, the informant reports were reviewed in detail. The sources of all reports of petitioner's reputation with respect to drugs, except for the names of four confidential informants, were disclosed to defense counsel.[1] A request for disclosure of the identities of the four informants was denied (Tr. 87-88).

During the course of the government's rebuttal testimony, the court instructed the jury (Tr. 101-102):

> * * * [A]s you were advised at the beginning of this case, it was stated to you that the defense was that of entrapment. The testimony of this witness concerning the defendant's reputation is admitted solely for the purpose of bearing upon her predisposition to commit the offense with which she is charged. * * * Does everyone understand that? [The jury indicates in the affirmative.] I will charge you at length on what entrapment is. But his testimony will only go to her willingness and readiness or predisposition to have committed the

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[1] The officer named the police records clerk (Tr. 88), identified the Ft. Lauderdale policewoman involved (Tr. 114), and turned over the report which had been given to the federal agents for introduction into evidence (Tr. 102).

offenses charged in the indictment, not that she actually did it.

At the time of trial, informant Stone's whereabouts were unknown (Tr. 23). McFarland was called by petitioner on surrebuttal and denied ever having purchased drugs from petitioner (Tr. 121-122). None of the other named sources of Officer D'Ambrosia's reputation testimony was called. In its general charge, the court instructed the jury on entrapment (Tr. 155-157). There were no objections to the charge (Tr. 160).

ARGUMENT

1. Petitioner challenges the trial court's admission of hearsay evidence for the purpose of establishing predisposition once the defense of entrapment has been raised. Predisposition is, of course, part of the government's burden once the defense of entrapment has been properly raised. As this Court held in *United States* v. *Russell,* 411 U.S. 423, relying on its prior decisions in *Sherman* v. *United States,* 356 U.S. 369, and *Sorrells* v. *United States,* 287 U.S. 435: "* * * [T]he thrust of the entrapment defense * * * focus[es] on the intent or predisposition of the defendant to commit the crime." 411 U.S. at 429. In *Sorrells,* the Court noted that "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." 287 U.S. at 451-452.

This Court has never determined the standards for admissibility of predisposition evidence,[2] and the

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[2] In *Sorrells,* Mr. Justice Roberts indicated in his separate opinion (in which Justices Brandeis and Stone concurred) that the rule established by *Sorrells* would permit the use of reputation testimony to establish predisposition. 287 U.S. at 458; and see the concurring opinion of Justice Frankfurter in *Sherman,* 356 U.S. at 382-383.

courts of appeals have adopted varying approaches.[3] In the present case the court of appeals, adhering to prior decisions of the Fifth Circuit, held that hearsay evidence was admissible to establish predisposition (Pet. App. A, p. 1a). While there appears to be some difference in the treatment of this issue by the various circuits (see note 3, *supra*), and while the Fifth Circuit rule may or perhaps should be subject to an exception where the particular hearsay evidence in question is

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[3] Cases in the Fifth and Ninth Circuits, including one in which certiorari was sought and denied, permit the use of hearsay to establish predisposition. See, *e.g.*, *United States* v. *Robinson*, 446 F. 2d 562 (C.A. 5), certiorari denied, 404 U.S. 959; *Thompson* v. *United States*, 403 F. 2d 209 (C.A. 5); *Pulido* v. *United States*, 425 F. 2d 1391 (C.A. 9). The Third Circuit has expressly rejected the use of hearsay. *United States* v. *Catanzaro*, 407 F. 2d 998. The First Circuit has rejected the use of hearsay in two decisions; however, in each case the evidence was inherently unreliable. *Waker* v. *United States*, 344 F. 2d 795; *Whiting* v. *United States*, 296 F. 2d 512. The Seventh Circuit has excluded hearsay when such evidence is found unreliable, *e.g.*, *United States* v. *Johnson*, 426 F. 2d 112, and admitted hearsay when such evidence is found to be reliable, *e.g.*, *United States* v. *Perry*, No. 72-1363, petition for writ of certiorari pending, No. 73-5091. Although noting that the prosecution is not subject to the usual restrictions on reputation and character evidence in showing predisposition, the Sixth Circuit has excluded hearsay in the form of information contained on file cards which the government agent admitted to be sometimes unreliable. *United States* v. *Ambrose*, Nos. 72-2190, 72-2191. Two other circuits have addressed the question only in terms of showing similar conduct, allowing such evidence in proper circumstances. *E.g.*, *United States* v. *Viviano*, 437 F. 2d 295 (C.A. 2), certiorari denied, 402 U.S. 983; *Hansford* v. *United States*, 303 F. 2d 219 (C.A. D.C.). The Eighth Circuit has held hearsay admissible on the issue of "probable cause" to initiate the transaction. *United States* v. *Siegel*, 16 F. 2d 134. However, as we noted in our opposition in *Perry* v. *United States*, *supra*, Sup. Ct. No. 73-5091; we are of the view that the government need not establish the basis for undertaking any investigation, so that evidence of the state of mind of government agents—hearsay or not—should not be admitted.

inherently unreliable or not probative and the evidence of entrapment substantial, resolution of this context-dependent, evidentiary question may properly be left to the courts of appeals. Cf. *United States* v. *Augenblick*, 393 U.S. 348, 355; *Palermo* v. *United States*, 360 U.S. 343, 353.

The hearsay testimony admitted here would pose a more troublesome question were the evidence of entrapment substantial. But here, the sole source of evidence on the entrapment issue was the somewhat vague and uncertain testimony of petitioner. She testified that the informant Stone told her that agent Walde's wife was an addict whose supplier had been "busted," and that she needed heroin[4] (Tr. 41). Whether or not the foregoing assertion would warrant submission of entrapment to the jury, the record is clear that in spite of her asserted reluctance to sell, petitioner nevertheless promptly and without any objective manifestation of reluctance agreed to make the sale, even though she had known Stone for only a month and had never met agent Walde before (Tr. 40, 42, 52-55).[5] Finally, since predisposition may be inferred from the evidence concerning the transaction itself, see, *e.g.*, *Waker* v. *United States*, *supra*, 344 F. 2d at 798, and since such evidence in this case was sufficient to support, if not compel, an inference of predisposition, the now

[4] Agent Walde denied that either he or Stone (as far as he was aware) had told petitioner that Walde's wife was an addict in need of heroin (Tr. 72). We note also that petitioner was initially uncertain as to whether she was told that the agent's wife was an addict before or after the sale (Tr. 50-51).

[5] The rapidity with which petitioner agreed to sell is in stark contrast to *Sherman*, where the government informer's own testimony showed that he was able to obtain narcotics from a fellow patient at a drug treatment clinic only after repeated requests and appeals to sympathy.

disputed hearsay evidence was cumulative and unlikely to have affected the jury's verdict.

2. The refusal of the district court to order disclosure of the identity of the four police informants who were the sources of some of the reputation testimony concerning petitioner did not violate her right to confront accusing witnesses guaranteed under the Sixth Amendment, since the informers' information did not relate to the criminal transaction at issue, and none of the unnamed informers was present at, or participated in, the sale of narcotics. See *McCray* v. *Illinois*, 386 U.S. 300, 309; *Roviaro* v. *United States*, 353 U.S. 53, 62. The court's decision not to require disclosure of their identities was based on considerations of safety of the informants and preservation of their usefulness for future investigations (Tr. 87) and did not constitute abuse of discretion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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